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Supreme Court, U.S.
FILED
OCT 7 2003
OFFICE OF THE CLERK

No. 03-159

IN THE

Supreme Court of the United States

SAM B. MCQUEEN,

Petitioner,

v.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT *(formerly known as* SOUTH CAROLINA COASTAL COUNCIL),

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

This case presents the rare spectacle of a state agency openly disavowing the fundamental obligation to obey federal law. Despite the Fifth Amendment, the Department claims for the State of South Carolina the unfettered power to take private property for public use without compensation, insofar as tidelands are concerned. The question presented here holds national importance, as evinced by the geographically diverse *amici* that have submitted briefs urging this Court to grant review.[1] Yet the Department regards this case as a matter of state law outside this Court's purview. The Department thus expects this Court to ignore the significance of this case for federal law, as well as the conflicts with this Court's decisions engendered by the decision below. But a decision with such troubling and far-reaching implications should not be permitted to stand unreviewed.

ARGUMENT

1. For the first time in this case, the Department launches a surprise attack on the owner's estate by claiming that "title to these lands passed to the state entirely" due to "longstanding common law principles that give the state a *jus privatum* interest in submerged coastal lands."[2] Br. Opp. 1, 9. In casting doubt on

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[1] *See* Brief of *Amici Curiae* Anthony Palazzolo, New England Legal Foundation, The American Farm Bureau Federation, and The South Carolina Farm Bureau Federation in Support of Petitioner; Brief *Amicus Curiae* of Pacific Legal Foundation in Support of Sam B. McQueen.

[2] The Department variously describes petitioner's lots as "regularly inundated by the tides" and as "submerged lands" situated "along the South Carolina coast." Br. Opp. 1, 7, i. However, both parcels sit some distance from the coast in the middle of a fully developed neighborhood, as the Department's own statements confirm. *See id.* at 3 (describing the land as "originally created by fill and located on saltwater canals"); R. 18 (stating in the Department's Final Administrative Order that "[m]ost, if not all, of the other lots on

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"whether Petitioner even retains an ownership interest in his property," the Department evidently aims to show that "the state, and not Petitioner, owns the property" so that "a taking claim, on any other conceivable theory, would fail." *Id.* at 9–10 n.4, 17. To support this unprecedented theory of automatic title transfer, the Department turns to a single sentence in the decision below: "Historically, the State holds presumptive title to land below the high water mark."[3] Pet. App. 5a.

But this transparent attempt to reframe the record actually supports review. Apart from its incorrectness

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48th and 53rd Avenues are improved and contain some type of bulkhead or retaining wall"). The court below did affirm that the lots fit the statutory definition of a tideland, Pet. App. 2a & n.4, in part because *portions* of them are "periodically inundated by saline waters" from adjacent "artificial water courses." S.C. Code § 48-39-10(G); *accord* R. 21 (citing § 48-39-10(G) in the Final Administrative Order). But this tidal flow, perpetuated by the Department's permit denials, does not render the land "submerged" as a matter of law. Under South Carolina law the term "submerged lands" includes only "the area below the usual low water mark," *State* v. *Hardee*, 193 S.E.2d 497, 497–98 (S.C. 1972), and the record lacks any finding that the owner's land comes within this definition. In any event, such factual errors or misstatements are irrelevant to his constitutional claim because "overbroad regulation of even completely submerged property may constitute a taking." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 n.4 (1985).

[3] Neither the language nor structure of the opinion below supports the Department's assertion that the presumption of title forms an "alternative ground" of decision. Br. Opp. 17. The court nowhere mentions the Department's theory that the owner lost legal title by force of a presumption. And the sentence on which the Department relies is in a paragraph immediately beneath the heading, "Public Trust Doctrine." Pet. App. 5a. As the petition correctly states, "[t]he decision below represents a final judgment that rests on a single ground of decision under federal constitutional law." Pet. 22.

under state law,[4] the Department's theory directly conflicts with this Court's decisions holding that "a State, by *ipse dixit*, may not transform private property into public property without compensation." *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164 (1980) (unanimous).[5] Put more tersely, "This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent." *Id.*

2. The Department counters that "[t]he decision below rests on state principles . . . that do not involve a federal legal issue." Br. Opp. 6. Invoking "the state's traditional sovereign powers over tidelands within its own borders," the Department also asserts that that decision involved only "the state's application of its property laws." *Id.* at 2, 9. The Department takes the position, then, that "[b]oth the scope of the state's public trust doctrine, and the nature of a landowner's underlying property interest for the purpose of a takings analysis (including the application of background principles) are questions of state law." *Id.* at 8.

Not so. No legal alchemy can transform the owner's claim into a question of state law. To be sure, "the existence of a property interest is determined by reference

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[4] South Carolina law provides that the state's presumptive title to tidelands may be rebutted based on proof that the state intended to grant land below the high water mark. *See, e.g.*, *Hobonny Club, Inc.* v. *McEachern*, 252 S.E.2d 133, 137 (S.C. 1979) (holding that "it was the clear intent of the grants in question to convey title to all tidelands . . . and that the State of South Carolina has no valid claim of title to said property"); *Lane* v. *McEachern*, 162 S.E.2d 174, 175–76 (S.C. 1968) (holding that a private owner held good title to tidelands).

[5] If the Department is correct in its reading of the decision below, the owner has a serious claim, quite apart from his takings claim, that applying an irrebuttable presumption to strip him of legal title to land has deprived him of property without due process of law within the meaning of the Fourteenth Amendment. *See, e.g.*, *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993).

to 'existing rules or understandings that stem from an independent source such as state law.'" *Phillips* v. *Washington Legal Found.*, 524 U.S. 156, 164 (1998) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)). But a background principle of law must be "defined by federal law" because it acts as a complete defense to a federal takings claim. *Howlett* v. *Rose*, 496 U.S. 356, 375 (1990). Otherwise, a state could circumvent the Takings Clause "by the simple device of asserting retroactively that the property it has taken never existed at all." *Hughes* v. *Washington*, 389 U.S. 290, 296–97 (1967) (Stewart, J., concurring). That a state might engage in such abuse presumably explains why this Court has "stress[ed] that an affirmative decree eliminating all economically beneficial uses may be defended only if an *objectively reasonable application* of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found." *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1032 n.18 (1992).

3. Not content to achieve the uncompensated conversion of the owner's property into "public lands," Br. Opp. 9, the Department insists that this drastic infringement of constitutional rights is shielded from this Court's jurisdiction. In this vein, the Department argues that the application of the background principles defense lies "within the state's purview" and that "this Court should have no real interest in the state's resolution of this question under its own laws." *Id.* (citations omitted). An inapposite rule—"the resolution by the highest court in a state of a matter of state law is not appropriate for federal review," Br. Opp. 8—cannot redeem an argument so at odds with the axioms of our constitutional republic.

South Carolina courts are bound to respect the owner's federal constitutional right to compensation, no less than if that right had been enacted by the South Carolina General Assembly. *See Claflin* v. *Houseman*, 93

U.S. 130, 136 (1876) ("The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are."). By claiming for the State of South Carolina the unreviewable power to take private property without compensation, the Department has not removed the conflicts between the decision below and the decisions of this Court—it has deepened them.

4. As the petition explains in detail, the decision below squarely conflicts with this Court's decisions in *Lucas* and *Palazzolo* v. *Rhode Island*, 533 U.S. 606 (2001). Pet. 12–20. If anyone ought to recover compensation under *Lucas*, surely it is Mr. McQueen, who has persuaded every court to have adjudicated his case that he has suffered a total taking. *See* Pet. App. 4a, 12a, 34a, 53a. Notwithstanding the owner's loss, the South Carolina Supreme Court denied compensation based on the "conclusory assertion," *Lucas*, 505 U.S. at 1031, that "[t]he tidelands included on McQueen's lots are public trust property subject to control of the State." Pet. App. 7a. The Department's insulting suggestion that "it is Petitioner's own neglect of his property that brought about the limitations on, if not the complete transfer to the public of, his former property interests," Br. Opp. 10, flatly contradicts this Court's teaching that a state may not "put an expiration date on the Takings Clause." *Palazzolo*, 533 U.S. at 627.

Despite these manifest conflicts with *Lucas* and *Palazzolo*, the Department insists that "the South Carolina Supreme Court properly construed the public trust doctrine, a longstanding common law doctrine, as a background principle of state law that prevents Petitioner from filling tidal wetlands in the circumstances of this case." Br. Opp. 14. While paying lip service to the "'objectively reasonable criteria' for identifying background principles set forth in *Lucas*," *id.* at 13–14, the Department fails to show how the South Carolina

court cited and applied those criteria.[6] Instead, the Department cites state law authorities, *id.* at 13–15, and invokes the "several states' sovereignty over their waterways." *Id.* at 14–15. At bottom, the Department maintains that "[b]oth the scope of the state's public trust doctrine, and the nature of a landowner's underlying property interest for the purpose of a takings analysis (*including the application of background principles*) are questions of state law." *Id.* at 8 (emphasis added). Such disregard for the limits placed by this Court on the background principles defense sharpens the conflicts between the decision below and this Court's decisions holding that "the government does not have unlimited power to redefine property rights," *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 (1982).

5. The decision below also conflicts with the GVR Order previously issued by the Court in this case. *See* Pet. 9–12. Contrary to the assertion that this Court's remand order left the lower court "free to look to alternative facts and theories," Br. Opp. 12, such an order from this Court is exactly what it purports to be—an order, not a suggestion. *Henry* v. *City of Rock Hill*, 376 U.S. 776, 777 (1964) (per curiam); *Yates* v. *Aiken*, 484 U.S. 211, 214 (1988) (unanimous). The gist of a GVR order is the requirement that a lower court reconsider its now vacated judgment in light of the intervening decision or development identified in the order. *See* Pet. 9–10.[7] But

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[6] The Department does claim that the court applied the objective criteria of a background principle of law, without bothering to say so, when it noted the environmental harms that would allegedly arise from allowing petitioner to build on his land and petitioner's supposed "neglect" in not seeking permits earlier. Br. Opp. 15. But this effort calls to mind shoehorns, bootstraps, and Procrustean beds.

[7] Decisions cited by the Department offer little support for its view that the South Carolina Supreme Court was not required by the GVR Order to reconsider its original decision in light of *Palazzolo*. Br. Opp. 12. *Lockheed Martin Corp.* v. *Space Sys./Loral, Inc.*, 324

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that is precisely what the Supreme Court of South Carolina failed to do. Thus the lower court disobeyed this Court's mandate. *See id.* at 10–11.

6. In addition to the multiple conflicts between the decision below and the decisions of this Court, review is also warranted because the question presented is undoubtedly an important question of federal constitutional law.[8] Not only is the decision below of doubtful constitutionality, but it has the effect of nullifying *Lucas* in South Carolina, at least in cases involving tidelands. Pet. 17. If such a result were permitted to stand in a case involving the same state and agency that gave rise to *Lucas* in the first place, other courts could be expected to follow South Carolina's lead. If the potential removal of a landmark of regulatory takings law[9] were not sufficiently serious by itself to merit

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F.3d 1308, 1310 (Fed. Cir. 2003) presents an intracircuit split with *Hughes Aircraft Co.* v. *United States*, 140 F.3d 1470, 1474 (Fed. Cir. 1998), as does *Moore* v. *Zant*, 885 F.2d 1497, 1503 (11th Cir. 1989) with *United States* v. *M.C.C. of Florida, Inc.*, 967 F.2d 1559, 1562 (11th Cir. 1992). In addition, *Moore* may be best explained as a special case where exceptional flexibility in responding to a GVR is justified because the case involved a habeas petition. *Kotler* v. *Am. Tobacco Co.*, 981 F.2d 7, 13 (1st Cir. 1992). *Kotler* confirms, however, that "the accepted norm" is for courts to restrict themselves to "the scope of [this] Court's remand order." *Id.* at 13.

[8] The Department quibbles that the petition does not allege a conflict among the lower courts. Br. Opp. 16. However, members of this Court have acknowledged that "the confused nature of some of our takings case law and the fact-specific nature of takings claims has led us to grant certiorari in takings cases without the existence of a conflict." *Parking Assoc. of Georgia, Inc.* v. *City of Atlanta*, 515 U.S. 1116, 1118 (1995) (Thomas & O'Connor, J.J., dissenting from denial of certiorari). Tellingly, *Lucas* itself mentions no such conflict. *See* 505 U.S. at 1010.

[9] Only last Term, every member of this Court acknowledged that the categorical rule of *Lucas* applies when an owner suffers a total

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this Court's intervention, the decision below also has the practical effect of casting a cloud on the title of some 374,234 acres of privately owned wetlands in South Carolina. Pet. 21 & n.14.[10]

CONCLUSION

The petition should be granted and the judgment below reversed.

Respectfully submitted,

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taking. *See Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465, 1483 (2002); *id.* at 1490 (Rehnquist, C.J., dissenting).

[10] Far from being "pure speculation," Br. Opp. 11 n.5, this figure solidly relies on estimates published by the U.S. Fish & Wildlife Service. *See* Pet. 21 & n.14. As for the Department's pettifoggery regarding the use of estimates beyond coastal wetlands, its complaint would be better directed to the South Carolina Supreme Court whose holding extends to all "land below the high water mark," Pet. App. 6a, regardless of its proximity to the coast.